PLANNING LAW

Welcome

Welcome to the latest issue of **Planning Law**, our bulletin in which we aim to keep you informed of current issues and news in planning.

For further information on any of the topics covered in this issue of **Planning Law**, please contact **Gary Soloman** on **0117 902 2791** or email: **gary.soloman@burges-salmon.com** or **Laura Fuller** on **0117 902 7232** or email: **laura.fuller@burges-salmon.com**

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Localism proposals march on

The Localism Bill is continuing on its journey through the Parliamentary process, having completed the Commons Committee Stage and emerging relatively unscathed.

Whilst local authorities are likely to be pleased that the provisions relating to enforcement are still intact, this will cause some concern for developers and landowners due to the uncertain scope of the provisions; that is provisions which would allow a Council to apply for a 'Planning Enforcement Order' whereby 'concealed' breaches of planning control may never be immune from enforcement action. Unhelpfully, a definition of 'concealment' has not yet been given.

Developers should also be aware of the requirement for compulsory pre-application consultation for large scale development proposals. Currently proposals would be considered large scale if the development is for 200 dwellings or more (or without dwellings specified, an area of 4 hectares) or 10,000 sqm additional floor space (or site area of more than 2 hectares). A statement setting out what consultation has been undertaken and the extent to which views have been taken into account will have to be submitted at the time of making the planning application.

It remains to be seen if Neighbourhood Planning will take off. The Bill's Impact Assessments estimate that the cost of a Neighbourhood Plan will be between £17,000 and £63,000. It is still unclear whether the introduction of Neighbourhood Plans will require Strategic Environmental Assessment which will further compound costs. The question remains therefore - will anyone be able to afford to promote a Neighbourhood Plan?

It is not surprising that the revocation of regional strategies remains part of the Bill, despite the protestations of the Labour ministers. Outside of the Bill, the Government has attempted to find a 'replacement' for housing targets in the form of the New Homes Bonus (NHB) incentive. The NHB final scheme design has now been published. The Government states that almost £1 billion (to be spread over the next four years) has been set aside for the scheme.

NHB will work by match funding the additional council tax raised for new homes and properties brought back into use for a period of six years, with an additional amount for affordable homes.

The Government has been at pains to make clear that NHB does not, nor is it intended to, replace or override the existing framework for making planning decisions, although it is intended to encourage more housing by creating an environment in which new housing is more readily accepted. In the absence of clear guidance from Government on this apparent contradiction, it may be left to the Courts to decide whether NHB should be regarded as a material consideration in the planning system.

NHB commences in April 2011. However, the Chief Planning Officer's letter of 10 November 2010 confirmed that all homes delivered from the date of the letter would be rewarded under the scheme.

For more information please contact John Webster on 0117 6632 or email: john.webster@burges-salmon.com

Revocation of regional strategies

- Cala Homes (South) Ltd v Secretary of State for Communities and Local Government [1]

In November last year Cala Homes applied successfully to the High Court to have the Government's attempt to revoke regional strategies (the strategic element of the statutory development plan in England) quashed. The effect of that decision was to reinstate regional strategies as part of the statutory development plan.

Immediately following the Court's decision, the Government issued guidance advising local authorities and Planning Inspectors that the intention to revoke the regional strategies was a material consideration to which they should have regard when deciding planning applications.

"A number of recent planning appeal decisions indicate that Planning Inspectors continue to give significant weight to the regional strategies."

Cala Homes returned to the High Court arguing that the Government's guidance was unlawful on the basis that (i) its purpose was to subvert the supremacy of the development plan, something that could only be done through primary legislation, (ii) it was irrational, given the uncertainty created by the Court's decision in the first Cala case, and (iii) the guidance should have been subject to strategic environmental assessment (SEA).

The High Court rejected Cala's claim. It distinguished between materiality and weight. Whilst the former was a matter for the Court, the weight to be given to that material consideration was a matter for the planning decision maker. The Government's guidance did not seek to subvert the development plan process nor was it irrational of the Government to draw attention to its legislative intentions. The intention to revoke was therefore a material consideration to which the decision maker could give as much or as little weight as he thought appropriate in the circumstances. On the SEA point, it was held that the guidance did not constitute a "plan or programme" for the purposes of the relevant regulations.

Although Cala was unsuccessful in this challenge, the High Court was clear that the regional strategies remained part of the development plan until revoked by primary legislation. A number of recent planning appeal decisions indicate that Planning Inspectors continue to give significant weight to the regional strategies. Cala's own planning appeal inquiry reconvened the day after the issue of this decision. Cala have also announced their intention to appeal the High Court's decision to the Court of Appeal.

As the Localism Bill makes its way through Westminster and revocation draws ever nearer (current estimates are for the Bill to be enacted in Spring 2012), then it is inevitable that less weight will be given to regional strategies. This sliding scale is less than ideal for what is meant to be a plan led planning system. The Communities & Local Government Select Committee held a number of sessions to consider the effects and implications of the abolition of the regional strategies. They recently published their report, which was highly critical of the Government's approach. They commented that "the peremptory abolition of Regional Strategies has created a hiatus in the planning framework, which risks producing a damaging inertia".

For further information, please contact Craig Whelton on 0117 902 2790 or email: craig.whelton @burges-salmon.com

[1] [2011] EWHC 97 (Admin)

A new form of regional planning?

Local Enterprise Partnerships (LEPs) have been introduced to replace Regional Development Agencies (RDAs), which are to be phased out by March 2012. The government hopes the new format will overcome many of the problems which beset RDAs, and that LEPs will empower local communities in England to drive forward local economic growth.

LEPs are intended to represent 'natural' or 'functional' economic areas, which are to be identified by reference to business patterns, housing markets and travel to work areas. The fundamental role of LEPs will be to provide strategic leadership in their area to establish local economic priorities and drive sustainable private sector led growth. To do so, LEPs will need to tackle a multitude of issues such as planning, local transport, housing, employment, enterprise and the transition to a low carbon economy.

The government's ambition is that LEPs will be business led partnerships between local councils and businesses and will have a board which is chaired by a local entrepreneur or business leader. A LEP's constitution and legal status will not be determined by statute, but instead be a matter for the partners to decide against the backdrop of the activities they wish to pursue.

Spatial planning?

Notwithstanding speculation during the concept phase of LEPs, the Government has recently made clear that it does not intend LEPs to take on the regional spatial planning functions of RDAs.

Devoid of statutory definition, LEPs will not hold any planning powers and will not directly affect strategic

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planning, although local authorities will be expected to have regard to them in preparing their local development frameworks and upon deciding planning applications.

31 LEPs and counting

Out of 62 proposals received by the Government to date, 31 have been approved. The 31 successful bodies have been invited to set up their Boards for recognition by Government Ministers.

In its recent budget, the government announced that it will establish 21 new enterprise zones, the first 10 of which have been described in terms of LEP areas in which they will exist. These areas are: Birmingham and Solihull; Leeds City Region; Sheffield City Region; Liverpool City Region; Greater Manchester; West of England; Tees Valley; North Eastern; the Black Country; and Derby, Derbyshire, Nottingham and Nottinghamshire. The purpose of these zones is to encourage employment and economic development in deprived or 'high-growth potential' areas by offering a package of incentives designed to kick-start the local economy.

The future

With RDAs expected to cease activity by March 2012, the government continues to encourage the transition to LEPs. LEPs are an integral part to the government's wider localism agenda of giving power back to local communities. In spite of the large amount of debate and concern surrounding exactly what LEPs will do and how they will do it, the government remains resolute that LEPs and locally grown solutions are the answer to the country's economic troubles. The shape of the emerging LEPs, and their ultimate success, remains dependant upon a degree of volunteerism at the sub-regional level, including local authorities and businesses.

For more information please contact Alex Minhinick on 0117 307 6874 or email: alex.minhinick@burges-salmon.com

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A warning against persistent breaches of planning control

The case of *Luigi Del Basso & Bradley Goodwin v Regina*[2] should sound some warning bells for anyone involved in enforcement action by a local authority.

The Court of Appeal ("CA") has confirmed that the Proceeds of Crime Act 2002 ("POCA") can be used in the context of planning enforcement to penalise those who persistently refuse to comply with the provisions of an enforcement notice.

The POCA proceedings were the culmination of enforcement action against the operation of an airport park and ride site without planning permission which commenced in January 2003 with the service of an enforcement notice. The park and ride use continued unabated over the next few years despite a failed appeal against the notice and two successful prosecutions for failure to comply with the notice.

Proceedings under POCA can result in monies earned through unauthorised development being confiscated. Confiscation proceedings were possible in this case because Del Basso and Goodwin were committing an offence (under s179 of the Town and Country Planning Act 1990) by failing to comply with the enforcement notice and they were convicted of this offence in the Crown Court. In this case following the second successful prosecution, the local authority asked the Court to proceed under s6 of POCA.

The Crown Court calculated that £1.88 million had been earned by the continued use of the park and ride facility in breach of the enforcement notice. A nominal confiscation order was made against Goodwin (who by then was bankrupt) but an order of £760,000 was made against Del Basso based on what money was available to him (being the value of his company shares and his motor boat). If payment was not made Del Basso could be imprisoned for 18 months.

On appeal, the CA had to consider whether the defendants had benefitted from their conduct and if so, what the recoverable amount should be. Whilst strong arguments were put forward on behalf of the defendants that neither had personally benefitted from the enterprise, as the park and ride was being used to raise money for the local football club, the CA held that it was for the judge to find as a matter of fact what property the two men had obtained and that would be the extent of the benefit. What happens to the benefit after it has been obtained forms no part of the statutory test. Therefore, the fact that the two men had not personally profited was irrelevant and the orders were upheld, despite the devastating personal consequences.

For more information please contact Laura Fuller on 0117 902 7232 or email: laura.fuller@burges-salmon.com

"What happens to the benefit after it has been obtained forms no part of the statutory test."

[2] [2010] EWCA] Crim 119

A question of economic viability?

R (on application of Kensington and Chelsea RBC) v Secretary of State for Communities and Local Government and Vannes KFT[3] involved an application to convert a hotel into residential units near Harrods. The application was refused as the conversion did not provide for any onsite affordable housing. Local authority guidance stipulated an onsite contribution of 50%. It was the developer's position that onsite affordable housing rendered the scheme unviable.

Consent was granted on appeal. The Inspector heard conflicting evidence on economic viability from the developer and the local authority. The Inspector found the evidence on viability to be unreliable and chose to give it little weight. He did, however, give weight to the developer's statement that the redevelopment was unlikely to go ahead if onsite affordable housing was required.

The High Court, at first instance, held that the Inspector had failed to properly consider a "principal controversial important issue (i.e economic viability) and quashed the consent.

The Court of Appeal overturned the High Court's decision. The Court of Appeal considered the principal important issue to be whether there should be onsite affordable housing and economic viability was merely a subset of that issue. The Inspector was fully entitled to conclude that the evidence on viability was unreliable and therefore of no significance. He was also entitled to look at other factors, including the benefits of redeveloping the site when making his decision. There was no reason why economic viability should be regarded as a pre-eminent stand-alone consideration.

The economic viability of schemes continues to be a difficult area for developers and decision makers. In this instance, the projections from the developer showed a £7m loss with affordable housing, whereas the local authority believed the scheme would still make a £10m plus profit. In the end, the Inspector decided the figures were so far apart as to be of no assistance. Whilst the level of development contribution continues to be a controversial issue, this case is a useful reminder that economic viability, although important, is only one aspect of the decision making process.

For more information please contact Fergus Charlton on 0117 902 7705 or email: fergus.charlton@burges-salmon.com

[3] [2010] EWCA Civ 1466

Interpretation of planning permissions and new planning units

The case of Stevenage Borough Council v Secretary of State for Communities and Local Government[4] involved a retail park which was subject to an overarching permission containing conditions restricting use and sub-division of the individual units. A separate consent was subsequently obtained for works to one of the units. That consent did not impose any conditions on use or sub-division.

Although the decision notice referred only to external works, an accompanying stamped approved plan also showed an internal sub-division. The developer undertook all works, including the internal subdivision. An application for a Lawful Development Certificate for unrestricted A1 retail use was then made. The planning authority refused the application on the basis that it was contrary to the conditions in the retail park permission.

The Inspector, on appeal, granted the certificate. He considered the internal sub-division works to constitute a new chapter in the planning history of the unit, and that consequently the conditions in the original permission did not apply. Stevenage Borough Council challenged the Inspector's decision in the High Court.

The Court upheld the Inspector's decision. Although the description of the development did not refer to the sub-division of the Unit, these were shown on a stamped approved plan. The Court held that the words of the application notice did not necessarily have primacy. The plan submitted with the application clearly showed the internal works, and these were therefore validly part of the consent. This resulted in a new planning unit to which the restrictions in the previous consent did not apply.

This is a useful decision which could (perhaps inadvertently) greatly increase the value of a commercial unit. However, one should proceed with caution. Careful consideration should be paid to the terms of the application, and the permission granted, and in particular, to the redline boundary as this will dictate how far one can rely on application of this principle in any given case.

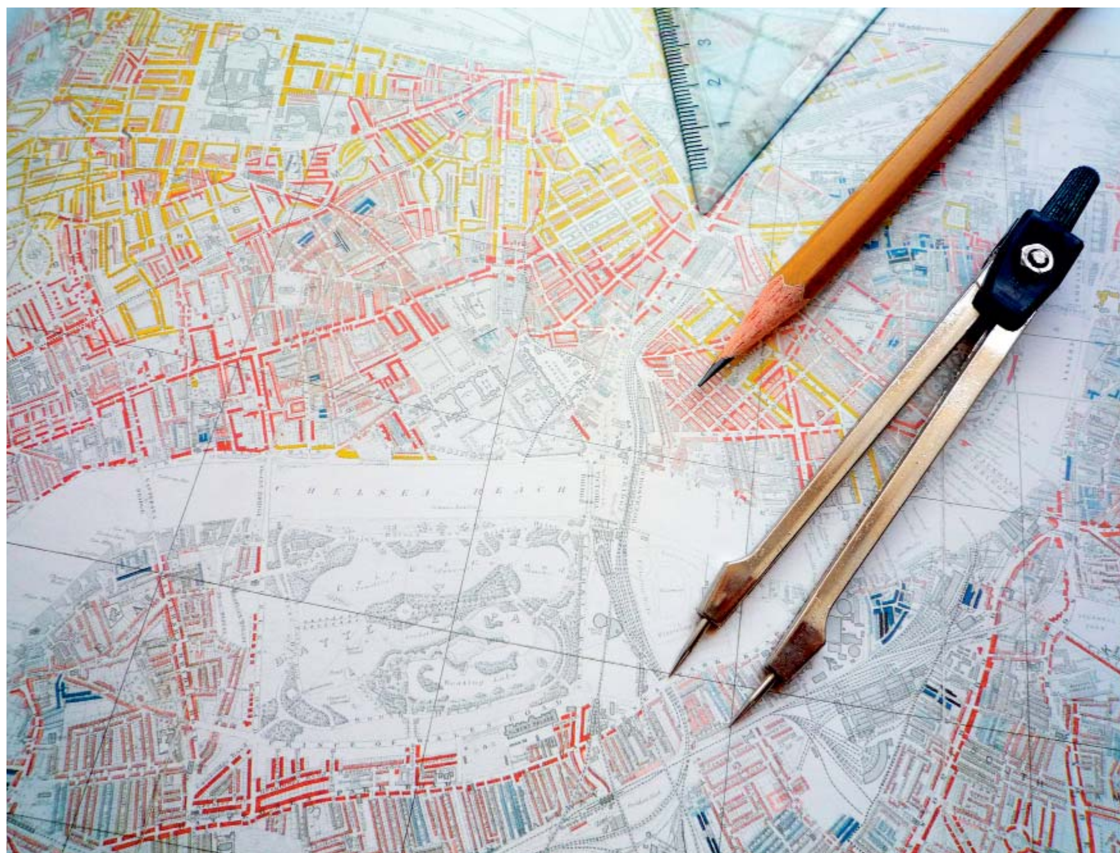
For further information, please contact Laura Fuller on 0117 902 7232 or email: laura.fuller@burges-salmon.com

"Both care and a flexible approach should be taken when assessing the extent of an application."

[4] [2010] EWHC 1289

Greater flexibility for planning permissions guidance

"Local planning authorities are encouraged to impose a condition listing approved plans."



In October 2010 CLG revised its guidance note: *Greater Flexibility for Planning Permissions.* The revised note contains practical guidance on the measures introduced on 1 October 2009 to make it easier for developers and local planning authorities to keep planning permissions alive for longer during the economic downturn and to make non-material and minor amendments to permissions.

In summary, these measures are:

1. **Extensions** - applications can now be made for an extension of time for the implementation of a planning permission granted on or before 1 October 2009. If successful, the application will result in a new planning permission.

2. **Section 96A** - non-material amendments can now be made to an existing planning permission. In deciding what is material, the LPA must have regard to the change, together with any previous changes under s96A to the permission as originally granted. The application is not for planning permission, therefore it does not result in a new permission.

3. **Minor Material Amendments** - until further legislative change, the Section 73 process of varying or removing conditions can be used to make minor material amendments to a planning permission. Local planning authorities are encouraged to impose a condition listing approved plans. Section 73 can then be used, for example, to replace plans.

The 2010 guidance is generally very similar to the 2009 version, subject to two important changes. Firstly, the guidance confirms that there is no right of appeal for refusal or non-determination of Section 96A cases as non-material amendment applications do not constitute an 'approval of the local planning authority' for the purposes of Section 78 of the TCPA 1990. This is a change from the 2009 guidance which advised such a right of appeal did exist and in reliance upon which, PINS has determined such appeals. Secondly, where an outline consent has been granted in phases, extensions of time can now be sought for the unimplemented phases. This was not the case under the earlier guidance which did not envisage any exceptions allowing for the extension of time where development had commenced.

For further information, please contact Sophie Summers on 0117 307 6966 or email: sophie.summers@burges-salmon.com

General Development Procedure Order 1995

The Town and Country (General Development Procedure) Order 1995 (the GDPO), easily confused with its sister order the Town and Country Planning (General Permitted Development) Order 1995 (the GPDO), has been revoked, and its provisions consolidated within a new order - The Town and Country Planning (Development Management Procedure) Order (the DMPO) - from 1 October 2010.

The DMPO maps out the procedural route that a local planning authority must follow on receipt of an application for planning permission. As part of the consolidation process, these procedural provisions have been reordered in a manner intended to make them more readily understood by local planning authorities, and more accessible for third parties.

The single substantive addition to the DMPO is the introduction of provisions allowing a local authority to extend the life of an existing outline permission for development which has already begun, where that permission requires or expressly permits implementation in phases. The deadline for the implementation of that permission can now be extended through the grant of a new outline planning permission.

This provision mirrors the existing procedure for extending unimplemented outline permissions which do not require or permit the phasing of development.

Certain provisions of the GDPO will continue to apply to applications, consents, agreements or approvals made prior to the commencement of the DMPO.

For further information, please contact Sophie Summers on 0117 307 6966 or email: sophie.summers@burges-salmon.com

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Planning Law team

Patrick Robinson
Partner

Tel: +44(0)117 902 6332

patrick.robinson@burges-salmon.com

Gary Soloman
Partner

Tel: +44(0)117 902 2791

gary.soloman@burges-salmon.com

Julian Boswall
Partner

Tel: +44(0)117 307 6851

julian.boswall@burges-salmon.com

Liz Dunn
Senior Associate

Tel: +44(0)117 902 2738

elizabeth.dunn@burges-salmon.com

Laura Fuller
Associate

Tel: +44(0)117 902 7232

laura.fuller@burges-salmon.com

Craig Whelton
Associate

Tel: +44(0)117 902 2790

craig.whelton@burges-salmon.com

Fergus Charlton
Solicitor

Tel: +44(0)117 902 7705

fergus.charlton@burges-salmon.com

Sophie Summers
Solicitor

Tel: +44(0)117 307 6966

sophie.summers@burges-salmon.com

John Webster
Solicitor

Tel: +44(0)117 902 6632

john.webster@burges-salmon.com

Alex Minhinick
Solicitor

Tel: +44(0)117 307 6874

alex.minhinick@burges-salmon.com

Visit our website at www.burges-salmon.com

One Glass Wharf
Bristol BS2 0ZX
Tel: +44 (0) 117 939 2000
Fax: +44 (0) 117 902 4400

Chancery Exchange
10 Furnival Street
London EC4A 1AB
Tel: +44 (0)20 7685 1200
Fax: +44 (0)20 7685 1266

www.burges-salmon.com

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A list of members, all of whom are solicitors, may be inspected at our registered office: One Glass Wharf, Bristol BS2 0ZX.

BURGES SALMON